80-850

NO.

Supreme Court, U.S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant,

versus

BOBBY H. HELMS,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether or not Ga. Code Ann. § 74-9902 is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, when the classifications established by said Code Section impose a misdemeanor penalty on those parents who willfully and voluntarily abandon their children and remain within the State of Georgia; while increasing the punishment to felony status for those parents who willfully and voluntarily abandon their children and leave the State, or after leaving the State.

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IN THE

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OCTOBER TERM, 1980

ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant,

versus

BOBBY H. HELMS,

Appellee.

On Appeal from the United States
Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

Appellant, Elie Jones, appeals from the final judgment of the Fifth Circuit Court of Appeals, which holds that the felony provisions

of Ga. Code Ann. § 74-9902(a), as applied in this case, are unconstitutional as being violative of Appellee's right to interstate travel, and right to equal protection as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The published opinion of the Fifth Circuit Court of Appeals, which appears in Appendix C, infra, is reported as Helms v. Jones, 621 F.2d 211 (5th Cir. 1980). The order denying habeas corpus relief by the United States District Court for the Middle District of Georgia, Columbus Division, the order denying a certificate of probable cause to appeal by the Georgia Supreme Court, and the findings of fact and conclusions of law denying State habeas corpus relief by the Superior Court of DeKalb County, Georgia are unreported. They

are, however, reprinted in the Appendices attached hereto.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals, which holds that the felony provisions of Ga. Code Ann. § 74-9902(a) are unconstitutional as being in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, was entered on July 11, 1980. See Appendix C, infra. The Motion for Rehearing was denied per curiam on September 3, 1980. See Appendix B, infra.

A Notice of Appeal was timely filed with the Clerk for the Fifth Circuit Court of Appeals on September 19, 1980. See Appendix A, infra. This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(b).

THE CONSTITUTIONAL PROVISION INVOLVED AND THE STATE LAW UNDER ATTACK

The Constitutional Provision involved is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

> ". . . no state shall . . . deny to any person within its jurisdiction the equal protection of the law."

The pertinent portion of the challenged State statute, Ga. Code Ann. § 74-9902(a), reads as follows:[1/]

> "If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother

---

1/ The entire Code Section is reprinted as Appendix G, infra.

> shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor."

STATEMENT OF THE CASE

I. RAISING THE FEDERAL QUESTION

The Appellee in this proceeding, Bobby H. Helms, was indicted by the Grand Jury of Muscogee County, Georgia on March 19, 1976, and was formally charged with abandoning his minor, legitimate child and leaving the State. On March 26, 1976, he entered a plea of guilty in the Superior Court of Muscogee County. Appellee's sentence was suspended on the condition that he pay $200.00 per month for the support and

maintenance of his child during her minority. On June 9, 1978, the Superior Court of Muscogee County determined that Mr. Helms had violated the conditions of his suspended sentence and consequently revoked the same.

On November 21, 1978, Mr. Helms filed a habeas corpus action in the Superior Court of DeKalb County, Georgia. By that action he challenged the constitutionality of the felony provisions of Ga. Code Ann. § 74-9902(a), arguing that his right to interstate travel, and his rights under the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section III, of the United States Constitution had been infringed by the classifications in said Code Section. The DeKalb County Superior Court denied relief, and ordered that the Appellee be remanded to State custody. (Appendix F, infra). Appellee's application to the Supreme Court

of Georgia for a certificate of probable cause to appeal was denied on February 27, 1979. (Appendix E, infra). Appellee then filed, on March 23, 1979, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Columbus Division. In this federal petition, Mr. Helms raised the same constitutional issues that he had previously raised in the State courts.

The district court decided the case on the briefs which were submitted by both parties, and entered an order on May 4, 1979, denying relief. The Court found that the Appellee's rights were not violated under either the Equal Protection Clause or under the Privileges and Immunities Clause. (Appendix D, infra).

Appellee's certificate of probable cause to appeal to the Fifth Circuit Court of Appeals

was granted, and this case was docketed in the Fifth Circuit on July 9, 1979. Subsequently, after the filing of briefs and oral argument, the Fifth Circuit reversed the District Court for the Middle District of Georgia, and held that Ga. Code Ann. § 74-9902 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Appendix C, infra). In its analysis of the statute, the Fifth Circuit also found that the statute infringed upon the Appellee's right to interstate travel, and consequently applied strict scrutiny to its evaluation. Thus, the Fifth Circuit considered and expressly addressed the equal protection issue; however, presumably because the Court found that ground alone was sufficient to grant relief, it did not address the privileges and immunities question.

II. STATEMENT OF THE FACTS

In May of 1972, the Appellee, Bobby H. Helms and his wife, Sylvia were blessed with the birth of a daughter, Angela Sue Helms. The couple, their natural daughter, and two other children by the wife's former marriage lived in Georgia until August of 1973, when Mr. Helms was transferred by the United States Army to Germany. He was accompanied by his wife and children.

In November, 1974, marital difficulties developed which subsequently resulted in Mrs. Helms and the children moving back to the State of Georgia. After his discharge from the Army in June of 1975, Mr. Helms also returned to the State of Georgia. During that summer he and his wife were divorced, and as a consequence of the same, Mrs. Helms was given custody of the children, and Mr. Helms was ordered to pay $150.00 per month for the

maintenance and support of his daughter. Mr. Helms made no support payments, but abandoned his children and moved to the State of Alabama where he remained in continuous violation of his support obligations. No payments whatsoever were made to his ex-wife for child support during the entire time that the Appellee remained in Alabama.

On February 13, 1976, Mr. Helms was arrested in the State of Georgia for the offense of child abandonment, and on March 19, 1976, the Grand Jury of Muscogee County, Georgia formally charged him with the felony of abandoning his child and leaving the State. Appellee pled guilty to the charge on March 26, 1976, and received a three year suspended sentence conditioned upon his paying $200.00 per month for the support and maintenance of his child during her minority. Upon his release pursuant to his suspended sentence,

Mr. Helms again immediately left the State of Georgia and returned to Alabama, where he failed to make support payments in accordance with his suspended sentence. A bench warrant was then issued for his arrest.

Sometime thereafter, Mr. Helms moved to South Florida, and resided in the Fort Lauderdale area. On February 17, 1977, his estranged wife was murdered by her third husband. Eventually, Mr. Helms was successful in gaining custody of his daughter, Angela Sue, in the State of Florida. He remained in Florida until January of 1978, when he decided to move to Augusta, Georgia. Augusta authorities had become alerted to Mr. Helms' presence within the State when it had been called to their attention that he was threatening the safety and well being of his daughter. He was eventually arrested by authorities in Augusta on the outstanding bench warrant from

Muscogee County, and was transported back to Columbus, Georgia where his suspended sentence was revoked, and he was ordered to serve three years imprisonment. His daughter was thereafter placed with a relative in Columbus, Georgia.

Subsequently, Mr. Helms pursued relief under habeas corpus in state and federal courts. As previously noted, the Fifth Circuit Court of Appeals eventually reversed his conviction, thus resulting in this appeal.

SUBSTANTIALITY OF THE QUESTION PRESENTED

Encompassed in the general issue on appeal, as applied to the factual situation in this case, is the question of whether a

state statute may constitutionally increase the criminal penalty from a misdemeanor to felony status, for an individual who commits a crime within the state and thereafter leaves the state. Under the challenged Georgia statute (Ga. Code Ann. § 74-9902) the underlying child abandonment must be found to be willful and voluntary; however, departure from the state, which in this case increased Appellee's potential punishment from a misdemeanor to a felony, need not be accompanied by any specific intent to flee nor intent to avoid prosecution.

In separate but similar cases, the Fifth Circuit Court of Appeals and the Georgia Supreme Court have rendered conflicting decisions addressing the questions posed on this appeal. Since the Fifth Circuit held that the Appellee's fundamental right to interstate travel had been infringed by the classifications

established in the Georgia statute at issue, said Court thus applied the strict scrutiny analysis, and held that the state interests were not sufficiently compelling to permit distinguishing between non-supporting parents within or without the State of Georgia. Applying the strict scrutiny rationale, the Fifth Circuit also recognized that the State of Georgia has adopted the Uniform Reciprocal Enforcement of Support Act (URESA), Ga. Code Ann. § 99-9A, et seq., which the Court found to be the less drastic means for the protection of state interests, as compared to the felony provisions of Ga. Code Ann. § 74-9902.

While this case was pending before the Fifth Circuit Court of Appeals, the Georgia Supreme Court decided Garren v. State, 245 Ga. 323, 264 S.E.2d 876 (1980). The factual situation of the defendant in Garren presented

an identical situation to that of the Appellee in the instant case. Both defendants were charged under Ga. Code Ann. § 74-9902 with abandoning their children and leaving the State, and both were convicted of felonies. Both defendants argued that the Georgia statute violated their constitutional right to interstate travel, and their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Contrary to the Fifth Circuit's holding, the Georgia Supreme Court found that a person who is charged with the commission of a crime within the State, does not have a constitutionally protected right of free travel. Id. at p. 323, citing, Mahon v. Justice, 127 U.S. 700 (1887) and Frisbie v. Collins, 342 U.S. 519 (1951); also see generally, California v. Byers, 402 U.S. 424, 435 (1971). Although the Fifth Circuit cited a possible distinguishing factor in Garren, supra (Helms v. Jones, supra at p. 213, fn. 11); nevertheless, a review of the Garren

opinion and the facts of this case does not support a conclusion that the cases are distinguishable. The cases appear to present identical situations.

Since this Court is the final arbitrator of federal constitutional law as decided by either the federal or the state courts, plenary review of this appeal is appropriate and necessary to alleviate the conflict between the Georgia Supreme Court and the Fifth Circuit Court of Appeals. See, Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974); Lego v. Twomey, 404 U.S. 477, 479 (1972).

Additionally, a review of the analysis which was utilized by the Fifth Circuit appears to be in conflict with prior decisions of this Court. The federal appellate court below apparently concluded that because the Appellee's right to interstate travel may have been infringed through the classifications in Ga. Code Ann. § 74-9902, then strict scrutiny was

automatically applicable, and the State was forced to demonstrate compelling interests to be protected by the classifications distinguished in the statute, as well as the utilization of the least drastic alternative for protecting said interests. This application by the Fifth Circuit failed to recognize that the right to interstate travel is not an absolute right, and before strict scrutiny is applicable, there must be some unreasonable infringement of that protected right. See, Memorial Hospital v. Maricopa County, supra, at p. 256-262; Shapiro v. Thompson, 394 U.S. 618, 630 (1969); Galvan v. Catherwood, 324 F.Supp. 1016, 1019 (S.D. N.Y. 1971), affirmed, 490 F.2d 1255, cert. den., 417 U.S. 936 (1974); United States v. Chalk, 441 F.2d 1227, 1283 (4th Cir. 1971), cert. den., 404 U.S. 743 (1971).

Assuming arguendo, the the Appellee in the instant case had the right to freedom of interstate travel notwithstanding the abandonment of his child, said right was not unreasonably infringed upon so as to invoke the strict scrutiny applied by the Fifth Circuit in its equal protection analysis. Thus, the Fifth Circuit properly should have examined Ga. Code Ann. § 74-9902 under the traditional, "rational state interest test."

The State of Georgia has numerous interests which justify the increased punishment for those individuals who, as did the Appellee, wilfully and voluntarily abandon their children and leave the State. Primarily there is the interest of the State in the protection of its minor children from the adverse impact of becoming public charges. The State also has an interest in the protection of the non-abandoning parent, the protection of the State's fiscal reserves from the burden of supporting children whose parents have

abandoned them, and the enhancement of the enforcement of State criminal laws.

The protection of all these interests is enhanced by the increased punishment provisions applicable to those parents who have left the State's jurisdiction. For example, in reality, states are much more likely to extradite individuals for felony violations rather than for misdemeanors. Additionally, simply locating the abandoning parent is easier when he is charged with a felony rather than a misdemeanor, because arrest warrants for felonies are placed on the National Crime Information Center computer listing, whereas misdemeanor offenses are not so listed. Even under the URESA statute, cited by the Fifth Circuit as an alternative remedy, locatic of the abandoning parent is often a problem to enforcement. Thus URESA is not always an available remedy, simply because the burden of locating

the abandoning parent often falls on the non-abandoning parent or child. Even if the abandoning parent is located, under URESA extradition may be averted, and the non-abandoning parent may be forced to travel to a foreign jurisdiction in an attempt to establish a valid support obligation. See, Ga. Code Ann. § 99-906a(b). Thus, URESA may not always be a viable alternative.

Moreover, Ga. Code Ann. § 74-9902 is a criminal statute, and the State of Georgia has an inherent interest in seeing that its criminal statutes are enforced. URESA is a social welfare statute, and cannot be used as a substitute for the state interests in enforcing its criminal laws.

The felony provisions of Ga. Code Ann. § 74-9902 only discourage migration between states if a parent has already abandoned his child, and is contemplating leaving the State's jurisdiction. If the parent has not

abandoned his child, the statute would impose no obstacle to migration, but would only discourage said abandonment once the parent has left the state. Those who travel and leave Georgia are unaffected by the statute unless they willfully and voluntarily decline to provide the means for their children to gain the bare necessities of life.

CONCLUSION

Thus, this Court should note probable jurisdiction of this appeal in order to alleviate the conflict between the Georgia Supreme Court and the Fifth Circuit Court of Appeals, and to correct the erroneous decision of the Fifth Circuit Court of Appeals which has a substantial adverse impact on the interests of the State of Georgia.

Respectfully submitted,

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Appellant

(Signatures Continued)

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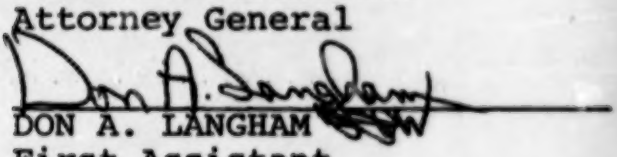

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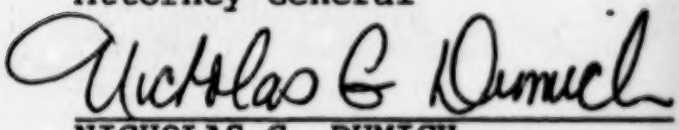

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Jurisdictional Statement and Appendices upon the Appellee by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for Appellee as follows:

Mr. James C. Bonner, Jr.
Attorney at Law
Prisoner Legal Counseling
Project, University of
Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601

This is to further certify that all parties required to be served have been served.

This 21st day of November, 1980.

NICHOLAS G. DUMICH

Appendices

United States Court of Appeals

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK

OFFICE OF THE CLERK

TEL 504-589-6
600 CAMP STRE
NEW ORLEANS, LA 7

September 19, 1980

Mr. Michael Rodak, Clerk
The Supreme Court of
the United States
Washington, D.C. 20543

No. 79-2596 - Bobby H. Helms vs.
Elie Jones

Dear Mr. Rodak:

Enclosed herewith is a copy of the notice of appeal filed on behalf of respondent-appellee on September 19, 1980 from this Court's opinion reversing and remanding the above cause entere on July 11, 1980.

As is the usual practice, we will await further advice from yo with respect to forwarding the record on appeal in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Barry W. Stiebing
Barry W. Stiebing, Chief
Judicial Support Division-B

BWS:ts

cc: Mr. James C. Bonner, Jr.
Mr. Nicholas G. Dumich

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-2596

BOBBY H. HELMS,

Petitioner-Appellant,

v.

ELIE JONES, WARDEN,

Respondent-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Elie Jones, the Respondent-Appellee above-named, hereby appeals to the Supreme Court of the United States, from the July 11, 1980, order of the United States Court of Appeals for the Fifth Circuit, which reverses the decision of the United States District Court for the Middle District of Georgia, Columbus Division, and which holds that the felony provision of Ga. Code Ann. § 74-9902 [1979 Supp.] is unconstitutional as being in violation of the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1254(b).

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
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JOHN G. WALDEN
Senior Assistant
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing attached Notice of Appeal upon:

Mr. James C. Bonner, Jr.
Attorney at Law
Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601

by depositing same in the United States mail, properly addressed and with sufficient postage prepaid. I further certify that all parties required to be served have been served.

This 16TH day of September, 1980.

Nicholas G. Dumich

NICHOLAS G. DUMICH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
SEP 3 1980
GILBERT E. GANUCHEAU
CLERK

NO. 79-2596

BOBBY H. HELMS,

Petitioner-Appellant,

versus

ELIE JONES, Warden,

Respondent-Appellee.

- - - - -

Appeal from the United States District Court for the Middle District of Georgia

- - - - -

ON PETITION FOR REHEARING

(SEPTEMBER 3, 1980)

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas A. Clark
United States Circuit Judge

APPENDIX B

Form 703-2

Bobby H. HELMS,
Petitioner-Appellant,

v.

Elie JONES, Warden,
Respondent-Appellee.

No. 79-2596.

United States Court of Appeals,
Fifth Circuit.

July 11, 1980.

Georgia prisoner, convicted of felony child abandonment, filed a petition for a writ of habeas corpus. The United States District Court for the Middle District of Georgia, J. Robert Elliott, J., denied relief and petitioner appealed. The Court of Appeals, Thomas A. Clark, Circuit Judge, held that the Georgia statute making the crime of child abandonment a misdemeanor if the offense occurs in Georgia, while making the same crime a felony if the abandoning parent leaves the state of Georgia or abandons the child after leaving the state, denied equal protection and infringed upon the fundamental right to travel.

Reversed and remanded.

Constitutional Law ⇐83(1), 250.1(2)
Parent and Child ⇐17(1)

Georgia statute making crime of child abandonment a misdemeanor if offense occurs in Georgia, while making the same crime a felony if abandoning parent leaves state of Georgia or abandons child after leaving state, denied equal protection and infringed upon fundamental right to travel. Code Ga. § 74-9902; U.S.C.A.Const. Amend. 14.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

The appellant, unable to meet his child support obligations, left the State of Georgia in search of vocational training opportunities.[1] He was subsequently convicted of child abandonment under Ga.Code Ann. § 74-9902 [1979 Supp.] and sentenced to three years' imprisonment. After exhausting state remedies he file a petition for habeas corpus under 28 U.S.C. § 2254,[2] which was denied. On appeal he attacks the constitutionality of the statute. We think the petition should have been granted and reverse.

In essence, the statute[3] makes the crime of child abandonment a misde-

1. Stipulation of Facts, Record at 7.

2. The appellant's discharge from custody during the pendency of this appeal does not moot his claim. *Carafas v. LaValle*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

3. Ga.Code Ann. § 74-9902 [1979 Supp.] provides:

> If any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, he or she shall be guilty of a misdemeanor. Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, after leaving this State, he or she . . . shall be guilty of a felony . . .

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meanor if the offense occurs in Georgia, while making the same crime a felony if the abandoning parent leaves the State of Georgia or abandons the child after leaving the State. The statute thus creates two classes of crimes, the first a misdemeanor for child abandonment within the State, the second a felony for leaving the State after abandonment or abandonment after leaving the State. Those outside Georgia, merely by their presence outside the State, are exposed to risk of a felony conviction while Georgia residents are exposed only to risk of a misdemeanor conviction for the same actions. We find the fundamental right to travel [4] is infringed by this classification system.

Employing "traditional" equal protection analysis, we are required to scrutinize strictly statutes which impermissibly interfere with the exercise of fundamental rights. Strict scrutiny requires a state to have a compelling interest which outweighs the infringement.[5]

Georgia argues that the compelling state interests here are (1) the greater ease in extraditing persons accused of felonies than those accused of misdemeanors and (2) the protection of the State's fiscal integrity by the resulting enforcement of required parental child support. These arguments are unpersuasive since Georgia has in place, through its adoption of the Uniform Reciprocal Enforcement of Support Act (URESA), Ga.Code Ann. § 99–9A, et seq.,[6] an alternative means of enforcing child support obligations. Fiscal integrity of the State, support of minor children, and extradition of the nonpaying parent are all protected by this Act.[7]

We therefore find no sufficiently compelling state interest here which permits distinguishing between nonsupporting parents within or without the State of Georgia. There is no question that the statute violates equal protection. Further, even where a governmental purpose is legitimate, as here, the "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." [8] Again, URESA provides a less drastic means of achieving the ends sought by this overly broad statute.

The failure of the statute to require criminal intent as an element necessary for conviction is further indication of its overbreadth. Under the provision a person leaving the State fully intending to support his or her children, but unable to do so, commits a felony. A series of noncriminal acts can thus become a crime under the statute, subjecting the nonresident to extradition and felony

4. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); and *U. S. v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

5. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1972).

6. *See specifically* § 99–906a providing for interstate extradition.

7. The State's compelling interest argument further loses force by the failure of the State actively to enforce this statute. At oral argument appellee's counsel stated that he knew of no other prosecutions, while appellant's counsel knew of only three. Thus, the State has made only broadly conclusory statements about the necessity for this statute as part of a concerted attempt to solve a major state problem.

8. *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960).

conviction.[9] The advisability of a specific intent in statutes prohibiting the fundamental right to travel is illustrated by comparison to the federal "flight to avoid prosecution or giving testimony" statute, 18 U.S.C. § 1073. In examining the requisite elements for a conviction of that offense, where the statute itself requires intent, we have observed that "the gravamen of the offense charged . . . is that the defendant fled a state with *intent* to avoid prosecution therein, and *mere absence from the state* of prosecution, though it renders one a fugitive from justice for interstate rendition [citation omitted] is not sufficient proof of a federal crime."[10] (Emphasis supplied)

Accordingly, we REVERSE and REMAND for the issuance of the writ.[11]

9. While we recognize that certain regulatory offenses do not require scienter or a criminal state of mind and that the criteria for distinguishing between crimes that require a mental element and those that do not are elusive, we decline to find the "crime" of crossing state lines as the type of "public welfare" statute which dispenses with *mens rea* as an element of the offense. *See generally, Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and authorities cited therein.

10. *Barrow v. Owen*, 89 F.2d 476, 478 (5th Cir. 1937).

See Ark.Rev.Stat.Ann. § 41-2405 (1975) for an example of a nonsupport statute which provides for specific intent. It creates a misdemeanor for failure to provide support, except if "the person leaves or remains without the State of Arkansas *with purpose to avoid a legal duty* to provide support to another person . . ." (emphasis supplied), then the offense is a felony. The official comments to this statute are instructive. They state:

> Prior law apparently imposed felony liability merely upon a showing that the defendant left the state. The difficulty in apprehending a defendant is not a relevant grading criterion in the case of any other offense, and nonsupport should not be an exception. In addition, the Commission was concerned with the fact that in an increasingly mobile society people often leave the state for reasons completely unrelated to possible support obligations . . .

We, of course, do not rule here on the constitutionality of Arkansas' statute, but merely find its approach of assistance on this point.

See also, In Re King, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970), where the California Supreme Court found a statute similar to Georgia's constitutionally defective.

11. In preparing this opinion we learned first through LEXIS and then from the Georgia Attorney General's office that the Georgia Supreme Court decided on February 26, 1980, that in its view the questioned Georgia statute is constitutional. *See Garren v. The State*, 245 Ga. 323, 264 S.E.2d 876 (1980). There the court was faced with one who had already been charged with abandonment before leaving the State. There is no discussion of intent and whether the State proved that the defendant left Georgia with intent to avoid prosecution and intent not to support his children. Thus, the facts in *Garren* may reflect that he was fleeing with intent to avoid prosecution and payment of child support. Absent intent, the statute permits conviction of an innocent person contrary to the common law requirement of a culpable state of mind as an ingredient of a criminal offense. The history and reasons for this element being an essentiality of a criminal act are eloquently described by Justice Jackson in *Morissette, supra* note 9. The Georgia court's decision does not alter our opinion in this case. We cannot concur with the notion that *mere* presence in another state can make the same actions a felony that are a misdemeanor in Georgia—this is a denial of equal protection and an impermissible limitation on travel.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

FILED
at 11:55 M P M
MAY 4 1979
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

BOBBY H. HELMS, Petitioner
v.
WARDEN ELIE JONES, Respondent

CIVIL ACTION NO. 79-36-COL.

J U D G M E N T

Pursuant the Memorandum and Order of this Court dated May 4, 1979, and for the reasons stated therein, the petition for writ of habeas corpus is denied, and

JUDGMENT IS THEREFORE ENTERED IN FAVOR OF THE RESPONDENT.

This 4th day of May, 1979.

WALTER F. DOYLE, CLERK
By
Jonnie L. Adams
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

BOBBY H. HELMS,
Petitioner

v.

WARDEN ELIE JONES,
Respondent

CIVIL ACTION NO. 79-36-COL

FILED
at 10:50 A.M. P.M.
MAY 4 1979
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

MEMORANDUM AND ORDER

The Petitioner in this habeas corpus application is serving a three year sentence for the offense of child abandonment which was imposed by the Superior Court of Muscogee County, Georgia pursuant to Petitioner's guilty plea. In November, 1978 Petitioner filed an action seeking habeas corpus relief in the DeKalb County Superior Court in which Petitioner challenged the constitutionality of §74-9902 of the Georgia Code Annotated, this being Georgia's child abandonment statute. Following an evidentiary hearing the DeKalb County Superior Court denied relief and Petitioner's application to the Supreme Court of Georgia for review of the trial court's ruling was denied. The Petitioner then filed a petition for the writ of habeas corpus in this Court and in this proceeding he makes the same contentions made in the state court.

There is no controversy concerning the pertinent facts. The only question presented is a legal one. Upon consideration, this Court determines that the Georgia statute referred to is not unconstitutional for any of the reasons urged by the Petitioner and that Petitioner's rights were not violated under the equal protection clause of the Fourteenth Amendment or under Article IV,

Application No. 884

SUPREME COURT OF GEORGIA

ATLANTA, February 27, 1979

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BOBBY H. HELMS V. ELIE JONES, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX E

Section II, of the United States Constitution. No evidentiary hearing is indicated and it is directed that the pending petition for the writ be dismissed as being without merit.

IT IS SO ORDERED this 4th day of May, 1979.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

FILED
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CHANDLER BRIDGES
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

BOBBY H. HELMS,	*	
Petitioner,	*	CIVIL ACTION NO. 9510
v.	*	
ELIE JONES, WARDEN STONE MOUNTAIN CORRECTIONAL INSTITUTE,	*	HABEAS CORPUS
Respondent.	*	

O R D E R

The above-captioned matter having come before this Court for a hearing on December 13, 1978, and after hearing oral testimony and considering documentary evidence submitted in this case, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

On March 26, 1976, Petitioner pled guilty in the Superior Court of Muscogee County to the offense of child abandonment. On the same date he was sentenced to three years imprisonment, such sentence being suspended on the condition Petitioner pay $200.00 per month for the support and maintenance of his child during her minority. On June 9, 1978, the Superior Court of Muscogee County found that Petitioner violated the conditions of said suspended sentence and consequently revoked the same.

Petitioner filed this action on November 21, 1978, seeking relief under habeas corpus. The only issue raised in his petition challenges the constitutionality of Ga. Code Ann. § 74-9902,

Georgia's child abandonment statute. Petitioner asserts that the wording of a portion of the statute violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

At the hearing conducted on December 13, 1978, Petitioner testified in his own behalf and was represented by counsel, Attorney James Bonner of the Prisoner Legal Counseling Project. Both parties also submitted brief memoranda in support of their positions.

CONCLUSIONS OF LAW

The challenged portion of Ga. Code Ann. § 74-9902 reads as follows:

> "If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the

penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor."

Although the Equal Protection Clause prohibits the State from arbitrarily discriminating among persons within its jurisdiction, some differences in treatment are permissible if the object of the state action can be rationally justified. Furthermore, there is a presumption in favor of the constitutionality of state statutes and a statutory discrimination will not be set aside if any statement of facts may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Absent invidious discrimination a rationally based classification does not run afoul of the clause. Massachusetts Board of Retirement v. Muriga, 427 U.S. 207, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

Likewise, the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution bars discrimination against citizens of other states where there is no substantial reason for the discrimination except for the fact that they are citizens of other states. See, Slaughter-House Cases, 16 Wall 36, 21 L.Ed. 394 (1872). However, the constitutional provision does not necessarily bar all disparity in treatment in cases where there are perfectly valid independent reasons for it. This was recognized in Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1157, 92 L.Ed. 1460 (1947), reh. den. 335 U.S. 837 (1948) where the Supreme Court stated:

"[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the

principle that the states should have considerable leeway in analyzing local evils and prescribing appropriate cures." Toomer at p. 396

In balancing the State interests served by the statute against the disparity of treatment imposed upon the Petitioner, this Court concludes that the State interests should prevail.

The State has an inherent interest in promoting the parental care and support of minor dependent children within the state, and in providing an inexpensive, speedy means to require that support. It becomes much easier to avoid the obligations of child support and escape prosecution for such when one leaves the State and removes himself from State jurisdiction. The more cumbersome process of extradition must then be utilized resulting in increased difficulty in the enforcement of Code § 74-9902.

The increased penalty is imposed under the statutory provision on two classes of individuals: (1) those who have abandoned their children and who have left the state, and (2) those who have left the state and who then choose to wilfully and voluntarily abandon their children. The increased penalty promotes the protection of minor dependent children by discouraging those who are in the first group from evading their parental obligations by fleeing the state. Thus, they are more apt to remain subject to State jurisdiction, and State interests can more easily be served. The statute discourages those who are in the second classification from abandoning their children once they have left the State's jurisdiction and have diminished the opportunity for enforcement of the support obligations. For this class of individuals the statute does not discourage interstate movement, but does discourage the abandonment of dependent minors by those who have increased

the likelihood of successfully evading their support obligations by leaving the State's jurisdiction.

Lastly the State has an interest in protecting its fiscal reserves from the financial burden of supporting children whose parents have abandoned them.

The aforementioned State interests are sufficient to overcome Petitioner's claims that his rights under the Equal Protection Clause of the Fourteenth Amendment and under the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution have been violated.

Thus, based on the findings of fact contained in this Order, and after considering all evidence and testimony presented, this Court concludes that none of Petitioner's constitutional rights have been violated and that all of his allegations are without merit.

It is thus ORDERED and ADJUDGED that Petitioner be remanded to the custody of the Respondent, Warden for the service of the remainder of the sentence challenged in this proceeding.

SO ORDERED, this 9th day of ~~December~~ January, 1978.

Curtis A. Tillman

CURTIS TILLMAN
Superior Court Judge
Stone Mountain Judicial Circuit

74-9902 (116 P. C.) Abandonment of child

(a) If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor. The wife and husband shall be competent witnesses, in such cases to testify for or against the other. The mother and the alleged father of the child, either legitimate or illegitimate, shall be competent witnesses in such cases to testify for or against each other, notwithstanding the fact that such testimony may relate to adultery by either the mother or the father which may have resulted in the conception of the child. A child thus abandoned by the father or mother shall be considered to be in a dependent condition when the father or mother charged with the offense does not furnish sufficient food, clothing or shelter for the needs of the child. The offense of abandonment shall be and is hereby declared to be a continuing offense. Former acquittal or conviction of said offense shall not be a bar to further prosecution therefor under this section, if it shall be made to appear that said child was in a dependent condition as defined herein for a period of 30 days prior to the commencement of prosecution.

(b) Provided, however, that any person, upon conviction of the third offense for violating the provisions of this section, shall be guilty of a felony and shall, upon conviction thereof, be imprisoned in the penitentiary for not less than one nor more than three years, which felony shall not be reducible to a misdemeanor by any judge presiding at the trial as provided in section 27-2501.

(c) Provided, however, if during the trial of any person charged with the offense defined in this section, such person contends that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall charge the jury that if its verdict is for the acquittal of such person, and that its reason for so finding is that such person is not the father or mother of the child alleged to have been abandoned, that its verdict shall so state, or if the person charged with the offense defined in this section is tried before the court without the intervention of the jury and the court renders a verdict of acquittal based on the contention of such person that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall so state this fact in his verdict of acquittal. In the event the verdict of the jury or the court shall be for acquittal of such person, and its reason for so doing is that such person is not the father or mother of the child alleged to have been abandoned, such person cannot thereafter again be tried for the offense of abandoning said child, and said verdict shall be a bar to all civil and criminal proceedings attempting to compel such person to support said child.

(d) In prosecutions under this section, when the child is illegitimate, and the accused father is convicted, the accused father shall be required by the court to pay the reasonable medical expenses paid by or incurred on behalf of the mother due to the birth of the child.

(e) The accused father and the mother of the illegitimate child may enter into a written agreement providing for future support of the child by regular periodic payments to the mother until such child reaches age 18 years, marries, or becomes self-supporting: Provided, however, such agreement shall not be binding on either party until it has been approved by the court having jurisdiction to try pending cause.

(f) Upon the trial of the accused father under this section, it shall be no defense that the accused father has never supported the child.

(g) In prosecutions under this section, when the child is illegitimate, the venue of the offense shall be in the county in which the child and the mother are domiciled at the time of the swearing out of the arrest warrant, but if the child and the mother are domiciled in different counties, venue shall be in the county in which the child is domiciled.

(h) In the trial of any abandonment proceeding in which the question of parentage arises, regardless of any presumptions with respect to parentage, the accused father may request a paternity blood test and agree and arrange to pay for same; and in such cases the court before which the matter may be brought, upon pretrial motion of the defendant, shall order that the alleged parent, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged parent, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged parent cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged parent is not the natural parent.

(2) The court shall require the defendant requesting the blood tests and comparisons pursuant to this subsection to be initially responsible for any of the expenses thereof. Upon the entry of a verdict incorporating a finding of parentage or nonparentage, the court shall tax the expenses for blood tests and comparisons, in addition to any fees for expert witnesses whose testimonies supported the admissibility thereof, as costs.

(Acts 1866, p. 151; 1878-9, pp. 66, 67; 1907, p. 57; 1941, pp. 481, 483; 1946, pp. 63, 64; 1952, pp. 173, 174; 1956, p. 800; 1960, pp. 952, 953; 1965, p. 197; 1967, pp. 453, 454; 1973, pp. 697, 699; 1976, p. 1015; 1980, pp. 1374, 1378, eff. July 1, 1980.)